No. 451.

Supreme Court of the United States.

OCTOBER TERM, 1908.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

WALTER B. ALLEN, as Administrator of the Estate of SAMUEL B. STEWART, deceased,

Defendant in Error.

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, to Error to the Circuit Court for the District of Washington, Northern Division.

BRIEF OF THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR.

JULIEN T. DAVIES,
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JOHN B. ALLEN,
FREDERIC D. MCKENNEY,
Of Counsel.

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THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Petitioner & Plaintiff in Error, *vs.* WALTER B. ALLEN as Administrator of the Estate of SAMUEL B. STEWART, deceased, Respondent & Defendants in Error.	No. 455.

Writ of Error to the United States Court of Appeals for the Ninth Circuit. In error to the Circuit Court for the District of Washington, Northern Division.

Brief of the Mutual Life Insurance Company of New York, plaintiff in error.

PRELIMINARY STATEMENT.

There is no difference between this case and the Phinney case so far as the Act of 1892 is concerned, but in this case as in the Hill case the questions of estoppel abandonment waiver and rescission arise upon the facts in the answer admitted by a demurrer.

I.

Statement of proceedings in Court below.

This action was commenced in the United States Circuit Court for the District of Washington, Northern Division, on the 28th day of December, 1897, to recover the sum of five thousand dollars ($5,000) with interest from July 9th, 1897, claimed to be due on policies of life insurance issued by the Mutual Life Insurance Company of New York (Rec. 2–11).

The answer was demurred to by the plaintiff (R. 22–24) and the Court sustained the demurrer to the answer and ordered judgment for the plaintiff Allen in the sum of $4,588 (Rec. 25).

An opinion was rendered by Hanford, J., in sustaining the demurrer and ordering judgment (Rec. 23). This opinion is simply to the effect that the case came within the rules laid down in the Phinney case.

The defendant excepted to the judgment (Rec. 26).

To reverse this judgment the defendant company sued out a writ of error to the United States Circuit Court of Appeals for the Ninth District, and the judgment was there affirmed.

For opinion of Circuit Court of Appeals by Hawley, District Judge, concurred in by Gilbert & Ross, Judges (see Record, page 37). Also reported in 97 Federal Reporter, page 985).

This opinion affirms the Court below simply on the "legal principles" arrived at by the same Court in the Hill case.

In December, 1899, a petition for a writ of certiorari was filed by the defendant company in this Court with a certified copy of the record and brief. This position and

brief was submitted to this Court with brief for Allen opposing application for certiorari (see papers on file).

Writ of certiorari was thereafter granted by this Court Feb. 5, 1900, and filed.

This cause now comes before this Court on a writ of certiorari for hearing on the merits.

II.

Abstract of Pleadings.

The complaint in this action is to recover on two policies.

I.—As to the first policy the complaint alleges that on the 18th day of February, 1893, the defendant company issued and delivered to Samuel B. Stewart the first policy in question dated February 18th, 1893, for the sum of $2,500. The policy provided that the annual premium should be paid in advance on delivery of the policy. The policy further provided as follows:

> "PAYMENT OF PREMIUMS.—Each premium is due and payable at the Home Office of the Company in the City of New York, but will be accepted elsewhere when duly paid in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is hereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by non-payment of premium, all payments previously made shall be forfeited to the company, except as hereinafter provided.

2. As to the second policy the complaint alleges that on the 28th day of February, 1893, the defendant Company issued and delivered to Samuel B. Stewart a policy dated on that date for the sum of $2,500. This policy provided that the annual premium should be paid in advance on the delivery of the policy.

The policy contained the same clause as to payment of premium as was contained in the first policy.

3. That on the 9th day of July, 1897, the said Samuel B. Stewart died.

4. That the said Stewart during his lifetime duly performed all the conditions of the contract.

The Answer.

The plaintiff in answering admits the issuance of the contract but denies that the contract was made or delivered anywhere except in the State of Washington, and further denies the allegation, that Stewart during his lifetime duly performed all the conditions of the contract and alleges affirmatively.

1st. That the application was made in the State of Washington, the policy delivered in the State of Washington and the first annual premium paid in the State of Washington ; that the premiums due on the 18th days of Feb., 1894, 1895, 1896, and 1897, had not been paid, and that the policies by their terms had been forfeited.

2d. The answer further alleges that the application for each policy contained the provision that the policy shall not take effect until the first premium shall have been paid and the policy shall have been delivered during Stewart's good health.

3d. The answer further alleges that Stewart was at all times advised that default had been made by him in payment of the premiums due in 1894, 1895, 1896 and 1897, and that in his lifetime he never paid or offered to pay any such premiums, and that the policies were marked forfeited and lapsed by the defendant company, and Stewart was at all times advised that the defendant had treated the policies as lapsed and forfeited, and that Stewart consented to such forfeiture and termination of said policy of insurance, and with a mutual knowledge and understanding on the part of defendant that said policies were at all times terminated, and relying upon such knowledge and mutual understanding, the said defendant never subsequently mailed or served any notice to said Stewart and the said Stewart fully acquiesced therein.

Demurrer to Answer.

The plaintiff demurred to the answer on the ground that none of the defenses state in the answer facts sufficient to constitute a defense.

III.

Chronological statement of facts admitted by the pleadings.

1892, Act of 1892 passed.

1893, Feb. 18. Stewart, a resident and citizen of the State of Washington, executed an application at Seattle, Washington, to the defendant company for two policies of insurance on his life, for the sum of Two thousand five

hundred dollars ($2,500) each, payable to his executors, administrators or assigns. These applications were forwarded to the home office in the City of New York. Pursuant to such application, policies, as applied for, were issued bearing date February 18, 1893, and forwarded from the home office in New York to the agent at Seattle, and delivered then to Stewart in payment of the first premium.

1894, Feb. 18. Premium not paid.
1895, Feb. 18. Premium not paid.
1896, Feb. 18. Premium not paid.
1897, Feb. 18. Premium not paid.

Stewart was at all times advised and informed that default had been made by him in the payment of each of the above premiums.

1897, Apr. 5. Law of 1897 went to force.
1897, July 9. Stewart died.
1897, Dec. 28. Suit commenced.

IV.

Statement of the case required by Rule 21.

The following statement presents succinctly the questions involved and the manner in which they are raised.

The first question is, whether the Statute of New York of 1892 applied or not to premiums which are not demanded to be paid within the State of New York. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors (see Point I).

The second question is, whether or not under the circumstances the policy was or was not a Washington contract, governed and construed by the laws of Washington alone, and not by the Statutes of New York in question.

The question is raised by the sustaining of the demurrer to the answer and the assignment of errors (see Point II).

The third question is, whether if the premium notice statutes of New York apply their equitable and true construction aids the plaintiff in keeping the policy alive. This question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon (see Point III).

The fourth question is, whether if any statutory notice was required the sending of notice was not waived by Stewart, and whether actual knowledge possessed and acted upon obviated the necessity for statutory notice. The question was raised by the sustaining of the demurrer to the answer and the assignment of errors thereon (see Point IV).

The fifth question is, whether or not the policy in question was not terminated by waiver, estoppel, abandonment and rescission, and the question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon (see Point V).

The sixth question is, whether or not it is essential to the maintenance of this action that Allen should have paid or tendered the premiums before suit. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon (see Point VI).

V.

Statement of Questions in Issue as Presented in the Petition for the Writ of Certiorari.

FIRST.

Whether the contracts of life insurance upon which

the action was brought, are contracts entered into and governed by the laws of the State of Washington or the laws of the State of New York, and whether said statutes of the State of New York of 1892, requiring notice to be given as therein prescribed, applies to this case or at all in the State of Washington.

SECOND.

Whether actual notice possessed and acted upon by the insured at the time the premiums fell due obviated the necessity of the statutory notice prescribed by the statute of New York, the insured at the time residing in the State of Washington.

THIRD.

Whether, if such statute does apply, the parties could and did waive the notice therein prescribed.

FOURTH.

Whether it was competent for the Legislature of the State of New York, under the said general statute of 1892, to alter and amend the charter of your petitioner, and if so, whether your petitioner, being a corporation created and chartered under a special act of the Legislature of New York, was intended to be included in or affected by said general act.

FIFTH.

Whether it was the meaning of the Legislature of New York that the act of 1892 should apply to a transaction taking place in the State of Washington, as disclosed by the record in this case, and whether said

statute follows your petitioner beyond the limits of New York as a part of its charter, or whether the same is operative only within that State upon corporate business there transacted.

SIXTH.

Whether the public policy of freedom of contract conferred by its Legislature upon foreign corporations transacting business in the State of Washington, should be a controlling reason for determining the contract a Washington contract not affected by the statute of New York.

SEVENTH.

If it should be held that the general statute of New York of 1892, respecting premium notices, applies to this case, whether failure to give the notice prescribed by the statute can operate to render your petitioner liable for a greater measure of insurance than the amount of the premium paid will purchase.

EIGHTH.

Whether the failure to give notice of a particular premium maturing will have the effect of keeping the policy alive, notwithstanding subsequent premiums have been knowingly left unpaid.

NINTH.

Whether, although your petitioner failed to give the notice prescribed by the statute of New York, and the premiums due on each succeeding year prior to the death of the insured remained unpaid, it would be an unlawful appropriation of your petitioner's property without con-

sideration, to require your petitioner in case of the death of the insured, to pay the policy.

TENTH.

In the event that the statute of New York should be held to apply to this case, whether an action can be brought to recover the amount of the policy until payment has been made or tendered of the past due and unpaid premiums.

ELEVENTH.

Whether, in the event it is held that the statute of New York applies to this case, it is a statute relieving the insured from the consequences of a breach of his contract, or whether it enters into the being and charter of your petitioner, and becomes a limit upon its powers of contracting outside of the State of New York.

TWELFTH.

Whether defendant in error, not having begun his action until the 28th day of December, 1897, can, in any event, avail himself of the New York statute, the amendment of which of April 5, 1897, is as follows:

"No action shall be maintained to recover under a forfeited policy unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest, or portion thereof, for which it is claimed that a forfeiture ensued."

THIRTEENTH.

Whether it is not a fatal departure from law to law for plaintiff, alleging as his cause of action a policy of insur-

ance, and compliance with its terms, and admitting the defence of non-payment of premiums, to recover judgment because the defendant has failed to show compliance with the unpleaded statute of New York in regard to mailing notice of the due date of premium.

FOURTEENTH.

Whether under the charter of the defendant Company and the Statutes of the State of Washington and the State of New York and the matters set forth in the record herein there is any liability on the part of the Company.

VI.

Specification of Errors.

THE FOLLOWING ARE THE ERRORS, ASSIGNED BY THE PLAINTIFF IN ERROR, UPON WHICH IT RELIES FOR THE REVERSAL OF THIS CASE.

1. The said court of error, in sustaining the demurrer of the defendant and plaintiff in error to the first affirmative defense of defendant and plaintiff in error to the first cause of action. Assignment of errors first upon record, page 46.

2. The said court erred sustaining the demurrer of the plaintiff and defendant in error to the second affirmative defense of said defendant and plaintiff in error to the first cause of action. Assignment of errors 2nd, page 47.

3. The said court erred sustaining the demurrer of the plaintiff and defendant in error to the first affirmative defense of defendant and plaintiff in error to the second cause of action. Assignment of errors 3rd, page 47.

4. The said court erred sustaining the demurrer of the plaintiff and defendant in error to the second affirmative answer to the second cause of action. Assignment of errors 4th, record, page 47.

5. The said court erred sustaining the demurrer of plaintiff and defendant in error to the answer of defendant and plaintiff in error. Assignment of errors 5th, record, page 47.

6. The said court erred in granting judgment in favor of the plaintiff and defendant in error against the defendant and plaintiff in error for the amount of said judgment or any sum, and because it was manifest upon the issues formed in said cause that said plaintiff was not entitled to judgment. Assignment of errors 6th and 7th, record, page 47.

7. The court erred in not submitting said cause to trial upon the issues formed by the pleadings. Assignment of errors 8th, record, page 48.

POINT I.

The premium notice statute of New York, of 1892, never had any application to the Stewart policy, because that statute did not apply to the business of collecting premiums demanded to be paid outside the State of New York. The contract was not subject to this particular statute of New York, because by its true construction it had no application.

For argument on this point, see Point II, Phinney Brief, at page 59.

In his opinion in sustaining the demurrer HANFORD, J. alludes to the policy provision that payments may be made at the home office in New York, but he does not advert to the further provision that they may be paid elsewhere and that as a matter of fact the premium was paid in Seattle.

POINT II.

Under the circumstances surrounding the application for the issuance and the delivery of the Stewart policy in the State of Washington, it was a Washington contract, and under the true doctrine of the conflict of laws, the New York Statute of 1892 was not the law of this contract.

For argument on this point, see Phinney Brief, Point III, at page 79; also Cohen Brief, Point II. See also the Opinion of the California Court, in the case of Rosson *v.* Equitable, appended to the Cohen Brief.

POINT III.

But if this Court should hold contrary to our contention in Point I., as above, that the Statute of 1877 apply to this contract and to the business of collecting premiums outside the State of New York, then it is submitted that the equitable and true construction of the statute so found applicable is that the statute operated on the first default alone without notice and did not preserve the contract forever on successive defaults, and further that the forfeiture of the premiums already paid was all that was prohibited.

For argument on this point see Point IV., in Phinney Brief, page 94.

For discussion of the Act of 1897, see Cohen Brief.

POINT IV.

If the Court holds that the true construction of the Statute of 1892, required a notice to be sent Stewart unless waived, then it is claimed by the plaintiff-in-error the sending of any statutory notice was waived by Stewart by the express terms of the policy, and that actual knowledge, possessed and acted upon by Stewart, obviated the necessity for statutory notice.

For argument on this point see Phinney Brief, Point V, p. 116.

It is admitted by the demurrer to the answer that Stewart was at all times advised and informed that default had been made by him in the payment of every premium subsequent to the first premium paid at the delivery of the policy; and that Stewart in his lifetime never paid or offered to pay any premium due upon the policy subsequent to the first. That Stewart was at all times advised that defendant had so treated said policy as lapsed and forfeited, and Stewart was at all times advised he had not paid the premium due February 18, 1894, and consented to the forfeiture and termination of the policy, and that with a mutual knowledge and understanding on the part of defendant and Stewart, the policy was at all times by the said parties deemed terminated from and after the eighteenth day of February, 1894; and relying upon such knowledge and mutual undersanding, the defendant never subsequently mailed or served any notice of the due date of premiums to or upon Stewart during his lifetime, and Stewart, at all times knowing that defendant was treating the policy as forfeited and lapsed, and at all

times knowing that he had not paid or tendered payment of any premium upon the policy subsequent to the first premium, acquiesced in and agreed to the mutual understanding that the policy was lapsed and forfeited, and by mutual agreement and consent, both the defendant and Stewart agreed and consented to the lapsing and forfeiture of the policy of insurance from and after the eighteenth day of February, 1894.

POINT V.

The contract was abandoned by Stewart and this he had a right to do.

For argument on this point see Phinney Brief, Point VI, page 143.

In this case the facts of actual knowledge of the default and its effect, of a mutual rescission and abandonment, and acquiescence in the forfeiture are fully admitted as to both polices. (See Answer, Paragraph VI, p. 15, and Paragraph VI, p. 17).

A policy holder who through a number of years has pursued the course admitted in this case—who has, knowing of the amount and the due date of his premium, refused to pay it—who has knowingly consented to the noting and entry of the forfeiture of the policy by the insurance company, and afterwards agreed and consented to the termination of the contract, and with that understanding has knowingly declined payment of all future premiums and induced the company to refrain from mailing notice—should be estopped from afterwards claiming the benefits of the contract. And if he, living, would be so estopped, the representative of his estate must be also.

It cannot be argued that the State of Washington has no public policy against fraud and misrepresentation and against rewarding parties for their own demerits and delinquencies, It has such a policy. It is the policy of the common law, operative wherever rules of conscience are enforced and wherever courts of justice close their doors against parties who seek to take advantage of their own wrong.

POINT VI.

The alleged cause of action was not pleaded and there was a departure. See Phinney brief, Point VII.

POINT VII.

The judgment should be reversed.

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